

1 Joel L. Herz, Esq. - State Bar Number 015105  
2 Law Offices of Joel L. Herz  
3 3573 East Sunrise Drive, Suite 215  
4 Tucson, AZ 85718  
5 (520) 529-8080  
6 Attorney for Plaintiff Joan Matthey

5 **UNITED STATES DISTRICT COURT**  
6 **FOR THE DISTRICT OF ARIZONA**

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Joan Matthey, a single woman, ) NO.  
Plaintiff, )  
vs. ) COMPLAINT  
Wells Fargo & Company, Plan Sponsor, a Delaware )  
corporation; Liberty Life Assurance Company of Boston, )  
a New Hampshire corporation; John Does 1-10; Jane )  
Does 1-10; ABC Companies 1-10; XYZ Corporations )  
1-10, )  
Defendants. )  
)

15 **COMPLAINT**

16 Joan Matthey (“Plaintiff” or “Ms. Matthey”), by and through her undersigned attorney,  
17 Joel L. Herz of the Law Offices of Joel L. Herz, for her causes of action against Wells Fargo &  
18 Company, Liberty Life Assurance Company of Boston, John Does 1-10, Jane Does 1-10, ABC  
19 Companies 1-10 and XYZ Corporations 1-10 (hereinafter collectively “Defendants”), allege,  
20 upon knowledge as to herself, and upon information and belief as to all other matters, as follows:  
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22 **STATEMENT OF CASE AND JURISDICTION**

23 Plaintiff, Joan Matthey, an individual residing in Pima County, Arizona, brings this action  
24 against Wells Fargo & Company, a Delaware corporation, Liberty Life Assurance Company of  
25 Boston, a New Hampshire corporation, John Does 1-10, Jane Does 1-10, ABC Companies 1-10  
26 and XYZ Corporations 1-10, individuals, companies or corporations who employed, insured, or  
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1 provided benefits to Plaintiff, the identities of which are not yet known to Plaintiff, under: (1) the  
 2 Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1104 (Breach of  
 3 fiduciary duty); §§ 1132 (Civil enforcement); §§ 1140 (Interference with protected rights)  
 4 including but not limited to 29 U.S.C. §1132(1)(B) to recover benefits due, to enforce rights  
 5 under the ERISA Plans, and to clarify rights for future benefits.  
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7       1.     Jurisdiction over the federal claims are invoked, inter alia, pursuant to 29 U.S.C.  
 8           1132(e)(1) (the statute dealing with jurisdiction under ERISA), 28 U.S.C. § 1331 (the statute  
 9           providing for federal question jurisdiction) and pendant jurisdiction. Jurisdiction is also  
 10          appropriate pursuant to 28 U.S.C. §1332 (diversity jurisdiction) in that the Plaintiffs and all  
 11          defendants reside in different states and the amount in controversy exceeds \$75,000. Jurisdiction  
 12          over the claims is appropriate because Plaintiff resides in Tucson, Pima County, Arizona, and  
 13          Defendants employed or insured or provided benefits to Plaintiff while she was a resident of Pima  
 14          County, Arizona.  
 15

#### VENUE

16       2.     This action properly lies in the District of Arizona, inter alia, pursuant to 28 U.S.C.  
 17           § 1391(b), because the claim arose in this judicial district.  
 18

#### JOAN MATTHEY AND HER DISABILITY

19       4.     Ms. Matthey is 53 years old. Until she became too disabled to work, Ms. Matthey  
 20          was employed by Wells Fargo Bank (“Wells Fargo”) as a personal banker. Ms. Matthey began  
 21          her employment with Wells Fargo in 1985 as a teller and has been repeatedly promoted. When  
 22          Ms. Matthey went on disability, Wells Fargo paid her no less than \$37,264.00 per year, plus  
 23          bonuses. As part of her compensation, Ms. Matthey was provided both short term and long-term  
 24          disability benefits. In addition, Ms. Matthey paid for optional long term disability coverage.  
 25          Long term disability should commence when an employee, like Ms. Matthey is unable to return to  
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1 work for six months. In Ms. Matthey's case, she has had her total colon and rectum removed  
2 causing her, *inter alia*, "severe unrelenting diarrhea over 20 times per day," inability to retain new  
3 information due to several surgeries lasting 8-10 hours in length, no bowel movements – only  
4 fluid, and burning which leads her to tears.

5       5. As set forth below, Ms. Matthey's physicians have repeatedly certified that she is  
6 totally disabled and unable to work.  
7

8 **FREDERICK A. KLEIN, M.D.**

9       6. On July 11, 2013, Frederick A. Klein, M.D., a board-certified physician  
10 specializing in gastroenterology and internal medicine, and Ms. Matthey's gastroenterologist,  
11 confirmed to Wells Fargo's long-term disability provider, Liberty Mutual, that Ms. Matthey is  
12 totally disabled as follows:

13           I am writing concerning my patient Ms. Joan Matthey. Ms. Matthey has  
14 undergone a total proctocolectomy with ileal pouch for severe ulcerative colitis.  
15 In spite of treatment with anticholinergics, as well as other medications, she  
continues to have severe unrelenting diarrhea over 20 times per day.

16           Given the extent of her problem with known ileal pouch and the severity of her  
17 diarrhea, **I feel that this patient does require a full disability as it is extremely**  
**difficult for her to carry on work of any sort.**

18           See letter from Frederick A. Klein, M.D. dated July 11, 2013, attached hereto as Exhibit A, at  
19 Matthey00310<sup>1</sup>.

21 **MELISSA RAY, M.D.**

22       7. On July 15, 2013, Melissa Ray, M.D., a board-certified physician specializing in  
23 Family Medicine, and Ms. Matthey's treating physician, stated as follows:  
24

25 \_\_\_\_\_  
26           <sup>1</sup> Liberty Mutual's claim file and policy have been bates-stamped Matthey001-Matthey00546.  
27 All references hereto to bates-stamped documents are documents already in Liberty Mutual's  
possession and contained within its claim file.  
28

1 Had 5 surgeries at Mayo in 2011, had hemorrhaging, needed multiple blood  
2 transfusions. Had colostomy bag for 1 year. Had takedown. States is in restroom  
3 15-20 times a day, up 5 times a night. Went back to work 2/2012 after surgery in  
4 11/2011. Ended up needing surgery 3 more times after that. States employer  
5 wasn't very accommodating. Will have increased BMs with any stress. Has also  
6 been working on diet modification. Also, with "burning in my back end" which  
7 will sometimes be so bad "it leads me to tears" and surgeon recommended  
8 exercise. Needs to take 3 showers a day to comfort rectum. States that no BM  
9 per rectum, will have fluid per rectum.

10 Surgeon then said to followup with local doctors. Has seen Dr. Klein for this,  
11 who said to get OTC paste. Was approved by SS disability, for 9 months, then if  
12 gets sick to stay on it. Has had hernia surgery since then. Has also had problems  
13 with memory since her surgeries, has had multiple long surgeries (8-10 hours).  
14 Tried to take class and wasn't able to retain any new information.

15 Has had 2 naps where woke up and took a while to know where she was. I  
16 scheduled to see Dr. Sullivan to evaluate this.  
17 ...  
18

19 **Given that her pouch is still maturing, and that she has such frequent BMs,  
20 as well as the unpredictable nature of this, agree that she is not able to work  
21 at this time. Discussed with Nancy Favata, PA who has been Ms. Matthey's  
22 caregiver in this office and will write a letter stating this.**

23 See Dr. Ray's July 15, 2013 note, attached hereto as Exhibit B (emphasis added).

24 **NANCY FAVATA, P/A-C**

25 8. On July 23, 2013, Nancy Favata, P/A-C, a board-certified physician assistant, and  
26 Ms. Matthey's treating physician's assistant, also confirmed that Ms. Matthey is totally disabled  
as follows:

27 This 53-year-old Caucasian female has a history of ulcerative colitis resolved  
28 status post five surgeries at the Mayo Clinic in 2011. She has colostomy bag for  
one year and had a takedown. Since this time she is in the restroom 15-20 times a  
day up to 5 times a night. She tried to go back to work on February 2012 after her  
surgery in November 2011. She required 3 more surgeries after that. She does  
see Dr. Klein for management of her diarrhea and he feels she is totally disabled  
and is writing a letter to this effect. **She is also having memory issues since her  
surgeries as she had multiple long surgeries 8-10 hours in length. She tried  
to take a class but was not able to retain any new information which  
obviously effects her job.**

29 **Given that her pouch is still maturing and that she has frequent  
30 unpredictable BM's and memory issues I feel she is unable to work at this  
31 time and is totally disabled.**

1 See Nancy Favata, P/A-C's July 23, 2013 letter, attached hereto as Exhibit C (Matthey00230)  
2 (emphasis added).

3 **SARAH SULLIVAN, D.O.**

4 9. On August 5, 2013, Sarah Sullivan, D.O., a neurologist, examined Ms. Matthey  
5 due to her recent memory loss issues. As set forth in her consultation report:  
6

7 She [Ms. Matthey] states that she was attempting to take a computer test but  
8 failed the test because she had difficulty focusing and concentrating. She  
9 subsequently dropped out of a course because of frustration regarding her  
memory.  
10 . . .

11 Joan Matthey is a 53-year old female seen in neurologic consultation at your  
12 request with regard to history of memory change with an extensive surgical  
history. Frontal infarct is certainly possible given the above symptoms. In  
addition, I cannot exclude complex partial seizure.

13 Seizure was ruled out via an EEG on August 8, 2013. See Northwest NeuroSpecialists, PLLC  
14 August 5, 2013 consultation report and Northwest Medical Center Electroencephalogram report,  
15 dated August 8, 2013, attached hereto as Exhibit D.

16 **SCOTT BELANGER, Psy.D.**

17 10. On August 15, 2013, a neuropsychological evaluation was performed by Scott  
18 Belanger, Psy.D., an Arizona licensed psychologist. Per his conclusion:  
19

20 **Ms. Matthey's pattern of neurocognitive performance meets criteria for**  
21 **multi-domain Mild Cognitive Impairment (MCI). She demonstrates mild**  
22 **impairment in visuoperceptual processing, visual memory, and aspects of**  
23 **executive functioning that likely represent a decline from a previously higher**  
24 **level of functioning.** In terms of localization, the pattern reveals weakness in  
areas of cognition mediated by the frontal lobes and greater involvement of the  
right cerebral hemisphere. This takes the form of deficits in executive  
functioning, along with weaker visuoperceptual processing and visual memory  
when compared to verbal counterparts.

25 See Neuropsychological Evaluation dated August 15, 2013, attached hereto as Exhibit E  
26 (emphasis added).  
27

1           **JACQUES HEPPELL, M.D.**

2           11. Jacques Heppell, M.D. is an Arizona board certified physician specializing in  
3 colon and rectal surgery. He is the physician who certified on July 24, 2012 that Ms. Matthey  
4 was unable to perform her job duties “with or without reasonable accommodation.” *See* Health  
5 Provider Recommendation for Accommodation, attached hereto as Exhibit F (Matthey0032-  
6 0034). He also performed the pouchoscopy in August 2012.

7           12. Per the Wells Fargo Description of Employee’s Job Duties, the activity  
8 requirement of Ms. Matthey’s job duties as Personal Banker 1 requires her, in each 8-hour day, to  
9 “frequently” sit, stand and walk for 3-6 hours. Her job activity level was specifically checked as  
10 “frequent,” not “never, seldom, or occasionally.” The job duties also require face-to-face  
11 customer contact, overtime and meeting quotas. The job description also states that “ongoing  
12 employment is contingent upon meeting all such requirements.” As set forth in the job  
13 description, a personal banker “sells retail banking products and services to customers and  
14 prospects. Manages customer portfolio, services relationships and cross-sells products and  
15 services. Provides broad base of financial and credit services with the goals of acquiring 100% of  
16 the customers’ business.” *See* Wells Fargo Description of Employee’s Job Duties, attached  
17 hereto as Exhibit G (Matthey004-005).

18           13. Ms. Matthey cannot meet the Wells Fargo job requirements as she cannot sit with  
19 customers for 3-6 hours per day as required to sell the products in order to meet her “productivity  
20 goals” due to having no colon, no rectum, severe diarrhea 20 times per day, no energy, and mild  
21 cognitive impairment to the point where she cannot retain new information.

22           14. Ms. Matthey cannot meet the Wells Fargo job requirements as the job causes stress  
23 and any stress increases the frequency of her bowel movements, as stated by Dr. Ray in her July  
24 15, 2013 report, as follows: “will have increased BMs with any stress.” In addition, where there  
25

1 is only one restroom at the bank branch, Ms. Matthey has to leave the branch and go to a  
2 neighboring business to use the restroom.

3 15. Ms. Matthey cannot meet the Wells Fargo job requirements, as she is currently  
4 taking no less than eight medications and supplements in an attempt to relieve her symptoms, as  
5 follows: Vitamin C, Vitamin D 50,000 IU D2, Potassium 20 meq, Vitamin B12, Loprimade,  
6 Chlorthalidone 50mg, Fluoxetine 20mg, Lorazepam as needed, Amitriptyline as needed, and she  
7 sometimes uses a cpap mask.

8 16. On July 5, 2010, the Social Security Administration found that Ms. Matthey was  
9 disabled. *See* Social Security Administration Notice of Award, attached hereto as Exhibit H.

10 17. On August 12, 2012, Liberty Mutual determined that Ms. Matthey was totally  
11 disabled and placed her on short-term disability for 26 weeks (25 weeks after the 7-day waiting  
12 period), from August 12, 2012 to February 9, 2013.

13 18. Instead of relying on Ms. Matthey's physicians' expertise who repeatedly stated  
14 that Ms. Matthey is disabled, examining Ms. Matthey in person, or hiring a vocational expert,  
15 Liberty Mutual sent Ms. Matthey's medical records to its own in-house doctor, Ronald Green,  
16 M.D. in London, Kentucky, for a peer review. *See* Exhibit I, Matthey00237-242.

17 19. Instead of relying on Ms. Matthey's physicians' expertise who repeatedly stated  
18 that Ms. Matthey is disabled, examining Ms. Matthey in person, or hiring a vocational expert,  
19 Liberty Mutual hired a company to follow Ms. Matthey and perform surveillance over 27 hours  
20 on February 5, 6, and 7, 2013 and paid that company \$1,995.00. As set forth in the surveillance  
21 report, all that was reported was less than 48 minutes of Ms. Matthey "walking in a free and  
22 unrestricted manner", bending, standing, and exiting and entering her vehicle. It is not contested  
23 that Ms. Matthey can walk, bend, and stand. What was not reported was how many times Ms.  
24 Matthey had to use the restroom throughout the day because of her severe diarrhea, how much  
25

1 she had to rest, and how her memory problems affected her. Based on the surveillance report, it  
 2 appears that the longest Ms. Matthey was away from a restroom was 20 minutes. Ms. Matthey's  
 3 job requires her to sit for 3-6 hours with no breaks. This surveillance report does not prove that  
 4 she can do so. *See Exhibit J, Kolb, Stewart & Associates, Inc. February 11, 2013 report*  
 5 (Matthey00215-00224) and invoice (Matthey00227).

6  
 7 20. Instead of relying on Ms. Matthey's physicians' expertise who repeatedly stated  
 8 that Ms. Matthey is disabled, examining Ms. Matthey in person, or hiring a vocational expert,  
 9 Liberty Mutual hired another doctor, Thomas Liebermann, M.D., with MLS Group of  
 10 Companies, to review Ms. Matthey's medical records and review the surveillance. *See Dr.*  
 11 *Liebermann's report dated February 27, 2013, attached hereto as Exhibit K (Matthey00250-*  
 12 *00254). Liberty Mutual paid Dr. Liebermann \$881.25 (Exhibit K, Matthey00225).*

13  
 14 21. Although Dr. Liebermann's report is dated February 27, 2013, he did not send a  
 15 letter to Nancy Favata, PA/C, requesting that she confirm what he quoted from their conversation  
 16 in his report was correct, until March 4, 2013. *See Exhibit K, Matthey00255.*

17  
 18 22. On March 6, 2013, Liberty Mutual denied Ms. Matthey's application for long-term  
 19 disability benefits, stating that "based on the review of the medical information and activity  
 20 observation, you are able to perform the duties of your Own Occupation. Therefore, you do not  
 21 meet your policy's definition of disability, and we must deny your claim for benefits." *See*  
 22 *Exhibit L, letter from Liberty Mutual dated March 6, 2013 (Matthey00412-00415).*

23  
 24 23. In Liberty Mutual's denial letter, Mr. Costa states that the medical documentation  
 25 was reviewed by a Physician, Board Certified in Gastroenterology, which indicated as follows:

26  
 27       ...

28  
 29 Current impairment is related to diarrhea with profound frequency and fatigue.  
 30 Nocturnal diarrhea and reported sleep apnea probably contribute to fatigue. The  
 31 cause of diarrhea is under investigation but workup has been postponed until

February 4, 2013[4] because of the recent surgery in December. There is adequate support for less than sedentary capacity pending her gastroenterology consultation and follow up after the scheduled EGD and pouchoscopy February 4, 2013, unless there is improvement in her clinical status prior to that date.

*See Exhibit L, Matthey00413.*

24. This is the review that was performed by Ronald S. Green, M.D, the doctor employed by Liberty Mutual. In his report, Dr. Green thought the diarrhea could have been caused by the drug "Sertraline"; however, as reported by Thomas Liebermann, a gastroenterologist hired by Liberty Mutual: "Sertraline given for the treatment of depression was thought to possibly enhance the claimant's problem with diarrhea. The claimant discontinued the medication but approximately one month later it did not appear that her diarrhea had changed substantially and therefore it is not possible to conclude with certainty that Sertraline had anything to do with her diarrhea." See Exhibit K, Matthey00253.

25. Liberty Mutual's denial also quotes the review by Thomas Liebermann, M.D., who himself reiterated that Ms. Mathey needs "to be close to a restroom as she experiences twenty-five bowel movements per day and night" as follows:

The claimant has a history of severe diarrhea. This problem creates logistical issues for her especially if she leaves the house as she has to be aware of where the restrooms are located. The diarrhea in itself has not been incapacitating since it does not cause dehydration or electrolyte abnormalities. The diarrhea appears not to have had a serious negative effect on her nutrition either. The claimant is not impaired beyond her need **to be close to a restroom as she experiences twenty-five bowel movements per day and night.** Following her hernia surgeries she was advised against lifting objects weighing more than twenty pounds. That limitation has been lifted as of the middle of January, 2013.

*See Exhibit K at Matthey00253; Exhibit L at Matthey00414.*

26. Liberty Mutual's denial letter includes Dr. Liebermann's peer-to-peer discussion with Nancy Favata, PA, who stated it was her opinion that "the claimant was not in a position to return to work in the foreseeable future." *See Exhibit L, Matthey00414.*

1       27. Liberty Mutual based its denial solely on a surveillance of Ms. Matthey and Dr.  
 2 Liebermann's review of that surveillance, who concluded as follows: "It is difficult to conceive  
 3 that an individual that is experiencing significant epigastric pain and especially up to twenty-five  
 4 bowel movements per day and night would be capable of providing what appear to be normal  
 5 shuttle services for her children, seemingly without difficulty and without the need for using  
 6 restrooms along the way." *See Exhibit L, Matthey00414.* But it cannot be possible that Dr.  
 7 Liebermann even viewed that video because it never shows Ms. Matthey, ever being away from a  
 8 bathroom, for more than 20 minutes. Again, the surveillance person either shut his videotape off  
 9 after less than 20 minutes and did not record the portions showing her going to the bathroom, or  
 10 the surveillance personnel destroyed the tape favorable to Ms. Matthey.

11       28. On April 5, 2013, Ms. Matthey appealed Liberty Mutual's decision. As set forth  
 12 in her letter, Ms. Matthey has had eight surgeries since 2011, is in the bathroom 20 to 25 times a  
 13 day, her rectum burns 80% of the time, and she takes 2 to 3 showers a day to keep the burning  
 14 down. The individuals who performed surveillance do not know what pain she suffered or how  
 15 often she used the restrooms before she left the house and when she returned. *See Ms. Matthey's*  
 16 *April 5, 2013 Appeal (without attachments) attached hereto as Exhibit M (Matthey00176-00177).*

18       29. Instead of relying on Ms. Matthey's board certified physicians' opinions,  
 19 personally examining Ms. Matthey, or hiring a vocational expert, on May 10, 2013, Liberty  
 20 Mutual had yet another independent peer review performed. This review was performed by a  
 21 New York, physician, Steven C. Tawil, M.D. (Exhibit N, Matthey 00261-00267) As was done  
 22 by Dr. Liebermann, Dr. Tawil writes his report, quoting conversations he had with Ms. Matthey's  
 23 physicians (Drs. Klein and Ray), but intentionally does not send letters to the physicians  
 24 requesting they confirm what he reported was correct, or provide corrections as to any  
 25 misstatements, until after the report was drafted, May 10, 2013. Dr. Tawil provided a deadline of  
 26 May 24, 2013 for the doctors to respond to his request. *See Exhibit N at Matthey00266-00267*

28

1 (letters to Drs. Klein and Ray dated May 10, 2013). Liberty Mutual paid Dr. Tawil \$926.25  
 2 (Exhibit N, Matthey00226).

3       30. Dr. Tawil also lists in his report that he reviewed the surveillance report of Kolb,  
 4 Stewart & Associates dated February 11, 2013. If Dr. Tawil would have reviewed the  
 5 surveillance report, he would have found that all that was reported was less than 48 minutes of  
 6 Ms. Matthey “walking in a free and unrestricted manner,” bending, standing, and exiting and  
 7 entering her vehicle. He would have also found that the longest Ms. Matthey was away from a  
 8 restroom was 20 minutes.

9       31. If Dr. Tawil would have reviewed the surveillance report, he would have come to  
 10 the conclusion that Ms. Matthey could not sit for 3-6 hours with no breaks, as required by her  
 11 own occupation.

12       32. If Dr. Tawil would have spoken with Ms. Matthey, he would have found that she  
 13 did not refuse to try the Amitriptyline, as he stated in his report (“She saw the gastroenterologist  
 14 who recommended Amitriptyline but did not try it”) (Exhibit N, at Matthey00263), but she had  
 15 actually ordered the medication and is taking it. Dr. Tawil would have also found that Ms.  
 16 Matthey was actually dehydrated, not hydrated as stated in his report.

17       33. Liberty Mutual intentionally did not allow Ms. Matthey’s doctors to respond to the  
 18 inconsistencies they found in Dr. Tawil’s report, and on the same date their responses were due,  
 19 May 24, 2013, blatantly denied Ms. Matthey’s appeal, based upon the unconfirmed conversations  
 20 that Dr. Tawil had with Ms. Matthey’s physicians, Drs. Klein and Ray. *See* Liberty Mutual’s  
 21 May 24, 2013 denial letter attached hereto as Exhibit O (Matthey00416-00424).

22       34. Liberty Mutual’s peer review physicians have never seen, interviewed, or  
 23 examined Ms. Matthey.

1           35. No vocational specialist has determined if in fact Ms. Matthey is physically  
 2 capable of performing her own occupation.

3           36. As a result of the many inconsistencies Ms. Matthey found in Dr. Tawil's report,  
 4 and the subsequent denial by Liberty Mutual of Ms. Matthey's appeal, Ms. Matthey experienced  
 5 many sleepless nights.  
 6

7           37. On January 27, 1989, the Eighth Circuit Court of Appeals, in *Mackinaw v. Otis R.*  
 8 *Bowen, M.D., Secretary of Health and Human Services*, 866 F.2d 1023 (1989), held that the  
 9 Secretary of Health and Human Services must "produce a vocational expert to establish that  
 10 Mackinaw is not disabled." Edward Mackinaw was an individual suffering from the same disease  
 11 as Ms. Matthey ("ulcerative colitis since 1969, underwent a total colectomy at that time and had  
 12 an ileostomy placed. The ileostomy bag, which Mackinaw must empty several times a day,  
 13 collects diarrhea and blood. His rectum is closed, but it bleeds when he is under physical strain").  
 14

15           38. The Veterans Administration has also determined that an individual with no colon  
 16 constitutes a 100% disability.  
 17

18           39. Pursuant to the terms of Wells Fargo's Group Disability Income Policy (the  
 19 "Policy"), Liberty Mutual agreed to pay to Ms. Matthey monthly disability benefits upon the  
 20 occurrence of a disability, as that term is defined in the Long Term Disability Plan, until Ms.  
 21 Matthey reached the age of 67 years old.  
 22

23           40. Pursuant to the terms of the Policy, to qualify for long term disability benefits, an  
 24 employee must:  
 25

- 26           • Be covered by the LTD Plan on the initial date of your disability.
- 27           • Be disabled as defined by the LTD Plan for more than 26 weeks.
- 28           • Continue to pay premiums for Optional LTD coverage during the LTD  
 waiting period and until your claim for LTD benefits is approved.
- Receive approval for LTD benefits by Liberty.
- Receive appropriate care and treatment by a doctor on a continuous basis.
- Provide proof that you are disabled under the terms of the LTD Plan.

1  
2       *See Exhibit P, Matthey00502-521.*

3       41.     As set forth in the Policy, “Disability” or “Disabled” means:

- 4           i.     that during the Elimination Period and the next 24 months of  
5              Disability the Covered Person, as a result of Injury or Sickness, is  
6              unable to perform the Material and Substantial Duties of his Own  
7              Occupation; and  
8           ii.     thereafter, the Covered Person is unable to perform, with  
9              reasonable continuity, the Material and Substantial Duties of Any  
10             Occupation.

11       *See Exhibit P, Matthey00507.*

12       42.     As set forth in the Policy, “Material and Substantial Duties” means:

13           **Material and substantial duties**

14       “Material and substantial duties” means responsibilities that are normally required  
15       to perform the Covered Person’s Own Occupation, or any other occupation, and  
16       cannot be reasonably eliminated or modified.

17       *See Exhibit P, Matthey00510.*

18       43.     As set forth in the Policy, “Own Occupation” means:

19           **Own occupation**

20       “Own occupation” means the Covered Person’s occupation that he was  
21       performing when his Disability or Partial Disability began. For the purposes of  
22       determining Disability under this policy, Liberty will consider the Covered  
23       Person’s occupation as it is normally performed in the local economy.

24       *See Exhibit P, Matthey00511.*

25       44.     As confirmed by Ms. Matthey’s board-certified physicians, Ms. Matthey is unable  
26       to perform the material and substantial duties of her own occupation for any employer in her local  
27       economy.

28       45.     The ERISA Plan Administrator has a duty to act in a fiduciary capacity for Mrs.  
29       Clark in getting her the disability income she is due.

1                   **MS. MATTHEY'S MEDICAL HISTORY**

2       46.      Ms. Matthey has had a long history of ulcerative colitis.

3       47.      Due to severe rectal bleeding and anemia, Ms. Matthey's medical condition was  
4 interfering with her work and she went off of work in July 2010.

5       48.      On July 5, 2010, the Social Security Administration found that Ms. Matthey was  
6 totally disabled.

7       49.      In January 2011, Ms. Matthey underwent a total colectomy and temporary loop  
8 ileostomy. This was complicated by a wound infection and a sinus tract, which required incision  
9 and drainage.

10       50.     In July 2011, Ms. Matthey underwent a proctectomy and IPAA with associated  
11 closure of the ileostomy in November, 2011.

12       51.     In November 2011, Ms. Matthey had a total colostomy takedown.

13       52.     Ms. Matthey had several complications and additional surgeries afterwards, but  
14 was able to return to work in January 2012.

15       53.     Ms. Matthey's continued to experience abdominal pain and diarrhea, but she  
16 continued working.

17       54.     On August 1, 2012, Ms. Matthey went to the Urology Department at Mayo Clinic  
18 for a follow-up regarding lower irritative voiding symptoms. The recommendation was to have a  
19 cystoscopy performed.

20       55.     On August 2, 2012, due to Ms. Matthey's complaints of bladder spasm, persistent  
21 problem with higher frequency of bowel movements and pain in the right lower quadrant of her  
22 abdomen, Ms. Matthey had a pouchoscopy performed at Mayo Clinic by Dr. Heppell. There was  
23 no evidence of pouchitis, but the increased frequency of bowel movements was of unknown  
24 etiology.

1       56. On August 3, 2012, Ms. Matthey had surgery for cystoscopy, right ureteroscopy  
2 and kidney stone extraction.

3       57. On August 11, 2012, it was determined that Ms. Matthey was unable to work and  
4 she was placed on short term disability beginning August 12, 2012.

5       58. On September 5, 2012, James Madura, MD of the Mayo Clinic performed an  
6 incisional hernia surgery.

7       59. On October 18, 2012, in a post-surgery visit, Dr. Madura examined Ms. Matthey,  
8 as she had firmness in the area after her September 5, 2012 hernia surgery and she notices that the  
9 firm area has gotten larger. She was complaining of gastrointestinal symptoms related to diarrhea  
10 and fecal incontinence. He determined that Ms. Matthey had a recurrent incisional hernia.

11       60. On October 18, 2012, Ms. Matthey was also seen by Dr. Heppell (colorectal  
12 surgery) with complaints of "having up to 20 bowel movements a day including four or five at  
13 night." He performed a pouchscopy and his impression was: "Macerated anoderm associated  
14 with persistent diarrhea, status post ileal-pouch-anal anastomosis, in a very pleasant 52-year-old  
15 lady with history of obsesity, depression, kidney stones, recurrent abdominal wall hernia,  
16 ulcerative colitis, hypertension, history of total abdominal hysterectomy." It was Dr. Heppell's  
17 plan to "obtain a MR enterography to rule out any inflammatory lesions in the small bowel that  
18 could lead to persistent diarrhea and I will ask Dr. Heigh (gastroenterologist) to see Ms. Matthey  
19 again for opinion and management."

20       61. On November 12, 2012, Ms. Matthey appeared at the Mayo Clinic for "2 month  
21 history of epigastric pain described as intermittent epigastric pain with occasional nausea. . .  
22 reports long-term history of frequent diarrhea up to 20 stools in a 24 hour period. This has been  
23 followed by Dr. Heppell who has performed pouchscopy. . ." It was Dr. Heppell's diagnosis  
24 that Ms. Matthey had "1. New onset of epigastric pain, possibility of gastritis, peptic ulcer  
25

1 disease, small bowel bacterial overgrowth; 2. Chronic diarrhea after 20 stools a day, possibly  
2 related to infectious etiology verus pouchitis, v. SIBO; 3. Recent MR enterography within  
3 normal limits with surgical changes of total colectomy and ileal pouch and ilecanal anastomosis;  
4 4. Recent evaluation by Dr. Madura with subsequent repair of incisional hernia tentatively  
5 scheduled December 7, 2012.  
6

7 62. On November 15, 2012, Ms. Matthey presented at her primary physician's office  
8 (Nancy Favata, PA/C – Melissa Ray, M.D.) with active problems of: sleep apnea, depression,  
9 diarrhea, hypertension, mycroscopic hematuria, pain during urination, pelvic pain, ulcerative  
10 colitis and vitamin d deficiency. She complained of several months of rectal bleeding every time  
11 she has a bowel movement and epigastric pain. She was ordered to discontinue Triamterene, and  
12 prescribed Chlorthalidone and Potassium Chloride.

13 63. On December 10, 2012, Ms. Matthey had abdominal ventral hernia surgery at the  
14 Mayo Clinic. She was ordered to continue to take the current eight medications she was on and to  
15 add two additional medications.  
16

17 64. On December 18, 2012, Ms. Matthey called the Mayo Clinic reporting a lot of  
18 "cramping abdominal pain, diarrhea and about 10 stools more than usual." She was told to follow  
19 up with her primary care physician.  
20

21 65. On December 27, 2012, Ms. Matthey had a follow-up visit with James Madura,  
22 MD at the Mayo Clinic for her hernia repair surgery. Dr. Madura noted that Ms. Matthey had  
23 discomfort for several days after surgery which has resolved and she "is only experiencing her  
24 preoperative symptoms consistent with her bowel issues prior. This is diarrhea after eating and  
25 occasional crampy left-sided pain."

26 66. On January 8, 2013, Jacques Heppell, M.D. contacted Ms. Matthey after having  
27 been contacted by Dr. Ronald Green, the doctor hired by Liberty Mutual to review Ms. Matthey's  
28

1 claim. As per Dr. Heppell's note, "Dr. Green noted that Mrs. Matthey is taking setraline.  
 2 Apparently this antidepressant can potentially be causing lymphocytic or collagenous  
 3 enterocolitis."

4 67. On January 11, 2013, Ms. Matthey followed up with Nancy Favata, PA with  
 5 regard to her chronic diarrhea (at least 20 episodes per day). Ms. Favata noted that Ms.  
 6 Matthey's gastroenterologist (and her surgeon – which was not her surgeon, but Liberty Mutual's  
 7 reviewing physician) think the diarrhea might be from the setraline but as Ms. Favata states,  
 8 "she's been on this for many years. Consequently, she discontinued her setraline several weeks  
 9 ago and now has increased anxiety and depression. **She still has diarrhea at least 20 episodes a**  
 10 **day and does have a follow up at the Mayo Clinic.** She would like to try a different  
 11 antidepressant." Ms. Favata also noted that "[s]he also has had a cough for several months."

12 68. Ms. Matthey returned to see Nancy Favata, PA/C and Dr. Ray on January 31, 2013  
 13 complaining of "two week history of intermittent dizziness that occurs episodically usually with a  
 14 change position." "She is s/p total colectomy for Ulcerative colitis and still has diarrhea at least  
 15 20 episodes a day with abdominal pain and is being evaluated at Mayo. However, she cannot  
 16 work due to the diarrhea and request disability paperwork completed." She was diagnosed with  
 17 probable vertigo as well as the longstanding diarrhea.

18 69. On March 18, 2013, Ms. Matthey went to Arizona Gastroenterology with  
 19 complaints of daily diarrhea (15 stools a day), "t]he problem is worse. Symptom is aggravated by  
 20 stress. Associated symptoms include flatulence, cramping. As per the comments:

21 This is a 53 year old female who presents with c/o increased stools daily with  
 22 some associated irritation. She was going to MAYO clinic in Scottsdale for  
 23 follow-up of her UC [ulcerative colitis]. She had colostomy takedown in  
 24 12/2011. And was doing well, but states that recently she has been having more  
 25 frequent stools-feels that some of it may be stress induced. **She gets nervous and**  
 26 **embarrassed at work, constantly excusing herself to use the bathroom. She**  
 27 **has brought paperwork to get a medical leave in order to try and get her**

1                   **symptoms more under control so that she may return and be a more**  
2                   **functional employee.”**

3                 70.       As set forth above, Ms. Matthey is not a malingerer, as she was attempting to get  
4                   her symptoms under control so that she may return to work.

5                 71.       On March 19, 2013, Ms. Matthey was seen by Nancy Favata, PA/C for complaints  
6                   of hand swelling. Ms. Favata changed her blood pressure medication from chlorthalidone to  
7                   amitriptyline.

8                 72.       On June 17, 2013, Ms. Matthey was seen by Nancy Favata, PA/C as Ms. Matthey  
9                   had fallen and landed on her tailbone. She was still complaining of persistent diarrhea some days  
10                  up to 20 stools a day.

12                 73.       On July 1, 2013, Ms. Matthey returned to Dr. Klein, her gastroenterologist.

13                 74.       On July 11, 2013, Dr. Klein wrote to Liberty Mutual certifying that Ms. Matthey  
14                  does “require a full disability as it is extremely difficult for her to carry on work of any sort.”

15                 75.       On July 15, 2013, Melissa Ray, M.D., Ms. Matthey’s treating physician certified  
16                  that Ms. Matthey is totally disabled, as follows:

18                   **Given that her pouch is still maturing, and that she has such frequent BMs,**  
19                   **as well as the unpredictable nature of this, agree that she is not able to work**  
20                   **at this time. Discussed with Nancy Favata, PA who has been Ms. Matthey’s**  
21                   **caregiver in this office and will write a letter stating this.**

23                 76.       On July 23, 2013, Nancy Favata, P/A-C, a board-certified physician assistant, and  
24                  Ms. Matthey’s treating physician’s assistant, also confirmed that Ms. Matthey is totally disabled  
25                  as follows:

27                   **Given that her pouch is still maturing and that she has frequent**  
28                   **unpredictable BM’s and memory issues I feel she is unable to work at this**  
29                   **time and is totally disabled.**

31                 77.       On August 5, 2013, Sarah Sullivan, D.O., a neurologist, examined Ms. Matthey  
32                  due to her recent memory loss issues.

78. On August 15, 2013, a neuropsychological evaluation was performed by Scott Belanger, Psy.D., an Arizona licensed psychologist. Per his conclusion:

**Ms. Matthey's pattern of neurocognitive performance meets criteria for multi-domain Mild Cognitive Impairment (MCI). She demonstrates mild impairment in visuoperceptual processing, visual memory, and aspects of executive functioning that likely represent a decline from a previously higher level of functioning.** In terms of localization, the pattern reveals weakness in areas of cognition mediated by the frontal lobes and greater involvement of the right cerebral hemisphere. This takes the form of deficits in executive functioning, along with weaker visuoperceptual processing and visual memory when compared to verbal counterparts.

79. Ms. Matthey is currently taking no less than eight medications and supplements, as follows: Vitamin C, Vitamin D 50,000 IU D2, Potassium 20 meq, Vitamin B12, Loprimade, Chlorthalidone 50mg, Fluoxetine 20mg, Lorazepam as needed, Amitriptyline as needed, and she sometimes uses a cpap mask.

## **BENEFITS DUE TO MS. MATTHEY**

80. As an employee of Wells Fargo & Company, Ms. Matthey was entitled to participate in and benefit from, the various benefit plans and programs made available to employees of Wells Fargo.

81. As an employee of Wells Fargo, Ms. Matthey Clark was entitled to participate in and benefit from, the Wells Fargo & Company Long-Term Disability Plan and such other Plans which have not been properly named or identified (collectively, the "Plans"). The Plans provide Ms. Matthey with a variety of health, retirement, insurance, and other benefits including but not limited to long term disability insurance.

82. As an employee of Wells Fargo, Ms. Matthey fell into a class that provided a benefit equal to 65% of her monthly base salary, as Ms. Matthey had optional long term disability coverage which provided an additional 15% over the usual 50%.

1           83. Ms. Matthey's medical condition has not changed since August 12, 2012, when it  
2 was determined she was disabled from performing her own occupation.

3           **PROBLEMS IN THE PROCESS OF HANDLING MS. MATTHEY'S CLAIM**

4           84. Despite the undisputed medical history, Liberty Mutual has denied Ms. Matthey's  
5 benefits.

6           85. Liberty Mutual based this claim upon peer physician medical records reviews,  
7 telephone conversations with some of her physicians, and surveillance.

8           86. Liberty Mutual hired peer review physicians who intentionally quoted  
9 conversations with Ms. Matthey's physicians without allowing the physicians to confirm what  
10 was stated in these conversations was correct.

11           87. These physicians never saw, interviewed, or examined Ms. Matthey.

12           88. No vocational expert has determined if in fact Ms. Matthey is physically capable  
13 of performing her own occupation.

14           89. Liberty Mutual, in its denial of benefits, is not aware of the stress caused by Ms.  
15 Matthey's position and that this stress contributes to her medical problems.

16           **PROBLEMS IN GENERAL OF LIBERTY MUTUAL'S**  
17           **PROCESS FOR HANDLING DISABILITY CLAIMS**

18           90. Under ERISA, ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) defines "fiduciary" as  
19 "a person is a fiduciary with respect to a plan to the extent (i) he . . . exercises any authority or  
20 control respecting management or disposition of its assets . . . "

21           91. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), "Fiduciary duties", reads in pertinent  
22 part:

(a) Prudent man standard of care

- 1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and;  
(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

92. The Plan Administrator cannot allow Defendant to act out of self interest in deciding what to deny. Clearly, it is in the interest of Defendant to deny claims because this saves the company money. But to comply with ERISA law, the Plan Administrator must act in a fiduciary capacity for Ms. Matthey's interest. In this case, her interest is in getting the disability income she is due. This is obviously very important to Ms. Matthey. Without this income, she is in constant danger of financial ruin. Ms. Matthey is raising her two daughters on her own, and has all the ordinary bills people have, including a mortgage. It was precisely to protect her financial health that Ms. Matthey sought the protection of a disability policy.

93. If the Plan Administrator gives Ms. Matthey's interests proper consideration, it would approve her claim. No good excuse exists for the Plan not to approve this claim. All of Ms. Matthey's doctors concur that she is disabled. Liberty Mutual had no evidence to the contrary, other than the opinion of its in-house doctor, Dr. Green, and out-of-state peer review physicians hired by Liberty Mutual – both of which based their opinions on surveillance where

1 the camera was either shut off after less than 20 minutes, or the surveillance personnel destroyed  
2 the tape favorable to Ms. Matthey.

3 **FIRST CAUSE OF ACTION**  
4

5 **(Violations of the Employee Retirement Income Security Act of 1974**  
6 **("ERISA"), 29 U.S.C. §§ 1101 et seq. - All Defendants)**

7 94. Plaintiff realleges the above paragraphs as if fully set forth herein.  
8

9 95. Defendants had an obligation to Ms. Matthey to provide benefits to Ms. Matthey  
10 under the terms of the ERISA Plan, including but not limited to disability benefits.  
11

12 96. Defendants have failed and refused to provide benefits to Ms. Matthey under the  
13 terms of the Plans, including but not limited to disability benefits.  
14

15 97. Ms. Matthey is entitled to recover benefits due to her under the terms of the Plan,  
16 to enforce her rights under the terms of the Plan, and to clarify her rights to future benefits under  
17 the terms of the Plan.  
18

19 98. Defendants should be enjoined from denying benefits owed to Ms. Matthey under  
20 the Plan, including but not limited to, the refusal and denial to provide disability benefits and to  
21 make payment to Ms. Matthey for all such benefits, plus reasonable prejudgment interest on such  
22 amounts.  
23

24 99. ERISA provides that all Plan Administrators have "fiduciary duties" such that they  
25 must discharge their duties with respect to a plan solely in the interest of the participants and  
26 beneficiaries and for the exclusive purpose of providing benefits to participants and their  
27 beneficiaries.  
28

100. Wells Fargo & Company, as the Plan Administrator of the Plan, did not discharge  
"fiduciary duties" in that they did not act solely in the interest of the participants and beneficiaries  
and for the exclusive purpose of providing benefits to participants and their beneficiaries.

101. Wells Fargo & Company, as the Plan Administrator of the Plan, has breached its “fiduciary duties” to Ms. Matthey. To the extent that any functions were assigned to Liberty Mutual, Liberty Mutual breached its duties also.

102. Plaintiff has exhausted the required administrative remedies.

103. Pursuant to Section 113 (g) of ERISA, Ms. Matthey is entitled to reasonable attorney's fee and costs of action.

104. Ms. Matthey is also entitled to a waiver of premiums per the terms of the policy for “any period for which benefits are payable.”

## **PRAAYER FOR JUDGMENT AND REQUESTED DAMAGES**

WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them:

A. For an amount which will make the Plaintiff whole, including but not limited to, retroactive benefits from the date that Defendants first stopped paying disability benefits and other benefits under the Plans, including but not limited to, waiver of premiums, retirement benefits and life insurance that would have – and should accrue – but for the wrongful denial of long term disability benefits by Defendants plus pre and post judgment interest in an amount to be proven at trial.

B. For attorneys' fees and costs in obtaining Judgment against Defendants.

C. For such further relief as the court deems just under the circumstances.

Dated: September 17, 2013  
Tucson, Arizona

/s/ Joel L. Herz  
Joel L. Herz  
LAW OFFICES OF JOEL L. HERZ  
La Paloma Corporate Center  
3573 East Sunrise Drive, Suite 215  
Tucson, Arizona 85718